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No. 71-845

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1971

MARTIN OIL SERVICE, INC.,
Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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December 28, 1971

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Petitioner Martin Oil Service, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this proceeding on September 30, 1971.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 49 Ill. 2d 260, 273 N.E.2d 823; it appears in the Appendix at A. 1-10, *infra*. The Circuit Court of Cook County, Illinois entered no opinion.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the construction of a statute of the United States is in issue.

STATUTES INVOLVED

The statutory provisions involved are 26 U.S.C. §§ 4081(a), 4082(c), 4083, 6420(a) and 6421. These provisions read as follows:

Sec. 4081(a)

"In general.—There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

Sec. 4082(c)

"Certain uses defined as sales.—If a producer or importer uses . . . gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this chapter be considered a sale."

Sec. 4083

"Exemption of sales to producer.—Under regulations prescribed by the Secretary or his delegate the tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline."

Sec. 6420(a)

"Gasoline.—Except as provided in subsection (h), if gasoline is used on a farm for farming purposes, the

Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(1) the number of gallons so used, by

"(2) the rate of tax on gasoline under section 4081 which applied on the date he purchased such gasoline."

Sec. 6421

"(a) Nonhighway uses.—Except as provided in subsection (i), if gasoline is used otherwise than as a fuel in a highway vehicle (1) which (at the time of such use) is registered, or is required to be registered, for highway use under the laws of any State or foreign country, or (2) which, in the case of a highway vehicle owned by the United States, is used on the highway, the Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon. . . .

"(b) Local transit systems.—

"(1) Allowance.—Except as provided in subsection (i), if gasoline is used during any calendar quarter in vehicles while engaged in furnishing scheduled common carrier public passenger land transportation service along regular routes, the Secretary or his delegate shall, subject to the provisions of paragraph (2), pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(A) 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon, by

"(B) the percentage which the ultimate purchaser's commuter fare revenue derived from such scheduled service during such quarter was of his

total passenger fare revenue derived from such scheduled service during such quarter.* * *"

QUESTION PRESENTED

The question presented is whether, in holding that the legal incidence of the Federal gasoline tax is not on the retail consumer, the Illinois Supreme Court has misconstrued the Federal statute imposing that tax.

STATEMENT OF THE CASE

Petitioner Martin Oil Service, Inc. ("Martin") is a distributor of gasoline in Illinois, through two wholesale and 47 retail outlets.

Since 1948, Martin has been licensed by the United States Treasury Department as a "producer" of gasoline,* pursuant to 26 U.S.C. § 4081 and regulations promulgated thereunder. Under that license, Martin is required to remit to the Internal Revenue Service ("I.R.S.") a Federal gasoline tax upon each gallon of gasoline sold by it at retail. (26 U.S.C. § 4081(a).) Continuously since 1948, Martin has collected the Federal gasoline tax from its retail customers and remitted that tax on a monthly basis to the I.R.S.

During the same period, Martin was also liable for the Illinois retailers' occupation tax on all its retail sales. Accordingly, Martin has remitted to the State of Illinois at the applicable rate the retailers' occupation tax which arose from its retail sales of gasoline.

From 1935 to 1962, the Regulations of the Department of Revenue of the State of Illinois provided that a retailer of gasoline who was also a producer thereof could deduct from "gross receipts" (the base upon which its retailers' occu-

*Section 4082(a) defines producer to include a wholesale distributor.

pation tax liability is computed) an amount equal to the Federal gasoline tax that the retailer remitted to the Federal Government.* Thus, from 1948 through 1962, Martin excluded the amount of the Federal gasoline tax from the base on which it computed its Illinois retailers' occupation tax liability.

Then, on January 10, 1962, without any change of the Federal or Illinois statutes and without any judicial determination, the Department of Revenue reversed its administrative construction so as to prohibit the deduction of Federal gasoline taxes from gross receipts in computing the retailers' occupation tax liability of a retailer which, as a producer, collected Federal gasoline taxes from its retail customers.

Martin thereafter ceased deducting the Federal gasoline tax in determining its "gross receipts" for retailers' occupation tax purposes, paid the State tax as so computed into a protest fund, and filed a claim for credit with the State Department of Revenue. On disallowance of the claim, Martin sued for review of the administrative determination

*From 1935 to 1962, the Illinois Regulations distinguished between retail and wholesale sales by sellers holding a Federal producer's license. See e.g. Article 3(4)f of the Illinois Retailers' Occupation Tax Rules and Regulations (1960). When wholesale sales of gasoline were made by a producer, gross receipts from the subsequent retail sales were held to include the Federal gasoline tax. The Regulations did not articulate the reasons behind this distinction, but the logical rationale is that the Illinois Department of Revenue concluded that the legal incidence of the Federal gasoline tax was not on the producer who sold the gasoline, but on the purchaser from such producer, so that on retail sales by producers the legal incidence was on the consumer and on wholesale sales the legal incidence was on the retailer.

in the Circuit Court of Cook County. The Circuit Court sustained the determination of the Department of Revenue, and the Supreme Court of Illinois affirmed.

THE FEDERAL QUESTION

Under established Illinois law, a retailer, in computing his retailers' occupation tax liability, is entitled to exclude from his "gross receipts" the taxes he collects from his retail consumer, when the legal incidence of the tax so collected is on the consumer.* Thus, as appears from the opinion of the Supreme Court of Illinois (A. 2), Martin's principal contention in this case was:

> "... that the legal incidence of the Federal gasoline tax is on the consumer-purchaser. If the legal incidence is indeed on the consumer-purchaser, the Federal tax is not to be included in 'gross receipts' in the computation of the retailers' occupation tax. ..."

The legal incidence of a Federal tax is clearly a Federal question. In holding that "the incidence rests on the producer," not the consumer (A. 3), the Illinois Court referred to various provisions of the Internal Revenue Code as well as to Federal legislative history, subjects which had been treated in the Briefs submitted to it. The determination of the question of Federal law was decisive to the question of state law,—*i.e.* whether or not the Federal tax should be included in the gross receipts taxed under the Illinois Retailers' Occupation Tax Act.

Under such circumstances the Federal question is reviewable by this Court. *Standard Oil Company* v. *Johnson*, 316

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*See *American Oil Co.* v. *Mahin*, 49 Ill. 2d 199, 273 N.E.2d 818 (1971), holding that a gasoline retailer may deduct from his retailers' occupation tax base the amount of Illinois motor fuel tax he has collected from his consumer.

U.S. 481, 483 (1942); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958); *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69 (1946).* "[W]here the non-federal ground is so interwoven with the other as not to be an independent matter . . ." the jurisdiction of the court "is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164 (1917). This principle has been recognized by leading commentators (Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 99, pp. 180-181 (Wolfson and Kurland Ed., 1951):

> "Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute, interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision. If this were not the rule, many interpretations of federal law by state courts would not be reviewable by the Supreme Court. . . ."

And, of course, when the highest state court concludes that a Federal question is before it and decides the question, as it did here, the issue is appropriate for presentation to this Court. *Moragne* v. *States Marine Lines*, 398 U.S. 375, 379 n. (1970); *Raley* v. *Ohid*, 360 U.S. 423, 436 (1959);

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*In the *Richfield* case, as described in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 99, p. 181 n., (Wolfson and Kurland Ed., 1951), "[t]he appellee contended that the United States Supreme Court did not have jurisdiction of the appeal, because the statute in question provided an exemption from taxation of 'The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America * * *.' It was the appellee's position that, under this statute, whether the Constitution forbade the taxation of the gross receipt in question was a state question. The Court, by accepting jurisdiction, implicitly rejected this contention."

WHYY v. Glassboro, 393 U.S. 117, 119 (1968). It is an "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided." *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134 (1914); Robertson & Kirkham, § 83 (Wolfson and Kurland Ed., 1951); Stern and Gressman, *Supreme Court Practice*, § 3.28.(4th Ed., 1969).

REASONS FOR GRANTING THE WRIT

A. The Issue Presented Involves Taxes In At Least 21 States.

A decision by this Court as to the incidence of the Federal tax on gasoline, which is obviously a Federal question, will be determinative not only of the instant case, but will authoritatively settle identical issues created under tax statutes in at least 21 states (A. 11-14) and in thousands of municipalities, including such major cities as Chicago, New York and Los Angeles.* That is, a decision here will determine whether or not a variety of state and local sales, use, occupation, gross receipts and license taxes that are measured by "gross receipts" or "gross proceeds" may be imposed on the amount of the Federal gasoline tax, collected by retailers from retail customers.

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*Appendix B, attached hereto, lists 13 states which impose taxes measured by gross receipts, and which do not exclude the Federal gasoline tax from the state tax base by statute. Appendix C, following, lists 14 states (including six appearing in Appendix B) which permit local governmental units to impose taxes measured by gross receipts, and which do not statutorily exclude the Federal gasoline tax from the local tax base.

The highest courts of six states have been faced with the issue at hand, and are evenly divided. The Illinois Supreme Court below admitted that the decision of the Supreme Court of Pennsylvania in *Tax Review Board* v. *Esso Standard Division*, 424 Pa. 355, 227 A.2d 657 (1967), *cert. den.*, 389 U.S. 824 (1967) (Philadelphia Mercantile Tax, a gross receipts tax), took a contrary position by its holding "that the legal incidence of the tax is on the purchaser-consumer" (A. 3). The Supreme Courts of Michigan and North Dakota have also held that the amount of the Federal tax is not to be included in the gross receipts realized by the seller in the computation of state taxes. *Standard Oil Company* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937) (Michigan sales tax, measured by gross proceeds); *Standard Oil Company of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447 (1941) (North Dakota sales tax, measured by gross receipts). See also to the same effect *Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 9 N.Y.S.2d 544 (1939) (New York City sales tax).*

On the other hand, the Supreme Courts of Georgia and Indiana have reached the same conclusion as the Illinois court. *Sun Oil Co.* v. *Gross Income Tax Division*, 238 Ind. 111, 149 N.E.2d 115 (1958) (Indiana gross income tax); *State* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224, *affirmed*, 226 Ga. 883, 178 S.E.2d 173 (1970) (Georgia sales and use taxes, measured by "sales price").

The Federal tax law has the same meaning throughout the nation. It is unfair and unrealistic that conflicting in-

*Other portions of this decision were reviewed and affirmed by the New York Court of Appeals and this Court. 281 N.Y. 647, 22 N.E.2d 480, and 309 U.S. 414 (1940).

terpretations of Federal law should subject persons in some states to higher taxes than those in other states. When the highest courts of a number of states differ as to what a Federal statute means, only this Court can provide a binding and uniform resolution of the question.

B. The Legal Incidence Of The Federal Gasoline Tax Is On The Consumer.

The operative words of the Federal statute (26 U.S.C. § 4081(a)) are:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

The Illinois court recognized that, though "the duty to remit the tax is on the producer," the "ultimate economic burden rests on the purchaser-consumer" (A. 4). Thus, as an *economic* matter, the producer is only a collector, and that incidence falls on the consumer. Absent a clear showing to the contrary, the *legal* incidence should be treated no differently. Indeed, a strong burden should rest on a party advocating that the law be read contrary to practical reality. Here, while the question of legal incidence is not made clear by the statute, the impact of the legislative history and companion statutory provisions indicates that the legal (as well as economic) incidence falls on the consumer.

The words of Section 4081(a)—the tax is "imposed on gasoline sold by the producer"—do not say whether the legal incidence of the tax is *on* the producer or consumer. And the fact that the Treasury Regulations (§ 48.4081-1(c)) require the producer to *remit* the tax does little to clarify the situation. This, of course, does not mean that the tax

is legally *imposed* upon such remitting producer, but merely provides an administratively convenient method of collecting the tax. Since there are far fewer producers than retailers or consumers, the method of collection adopted greatly simplifies the enforcement burden carried by the I.R.S.* In this regard, it is significant that Congress chose to collect the tax not from the first producer of gasoline, but from the producer closest to the consumer in the distributive chain who can be taxed consistently with the administrative policy of convenience just expressed. That is, the Federal gasoline tax is not collected when a sale is made from one producer to another, but only when it passes from the last producer's control (26 U.S.C. § 4083).

Congress has manifested its intent to legally impose the Federal gasoline tax upon the consumer by providing, in certain instances, for refunding Federal gasoline taxes to the ultimate consumer even though they were originally remitted by a producer. For example, the tax on gasoline used on a farm for farming purposes is refunded directly to the consumer of that gasoline (26 U.S.C. § 6420(a)). Similarly, the tax is refunded to the ultimate consumer at the rate of 50% when the gasoline is used for off-highway purposes other than farming (26 U.S.C. § 6421(a)), or by local transit systems (26 U.S.C. § 6421(b)). Thus, even

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*The device of funnelling tax remittances through administratively convenient conduits is a common one when the class of taxpayers upon whom the tax is legally imposed is very numerous. Indeed, this Court has characterized the use of a distributor as a tax collector as "a familiar and sanctioned device". *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 338 (1944). See also *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 93 (1934); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, 68 (1939).

though the tax is collected by the Federal government from the producer, Congress provided that it should be refunded directly to the consumer in these instances.

Martin is unaware of any precedent for concluding that Congress intended to provide a refund of tax to persons upon whom the legal incidence did not rest. The court below characterized these payments as "not refunds in a technical sense," but merely "allowances . . . based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer" (A. 6). But that is to ascribe to Congress an intent for which there is no precedent. It also differentiates artificially between economic burden and legal incidence.

Other statutory provisions also demonstrate that the tax was meant to be imposed only on the user of the gasoline. For example, Congress specifically provided that when a producer *uses* gasoline produced or imported by him, such use should be considered a taxable sale (26 U.S.C. § 4082(c)). Conversely, in Revenue Ruling 64-211, 1964-2 Cum. Bull. 421, the I.R.S. ruled that no tax is due when a consignee of the producer loses the gasoline through evaporation or spillage so that the gasoline never reaches the ultimate consumer. The tax is thus imposed when gasoline is *used*, but not if it is not used.

These statutory provisions taken together lend much weight to the conclusion that, whatever the collection procedure utilized, the Federal gasoline tax rests on the consumer rather than the producer.*

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*In the court below, respondent relied upon *Lash's Products Co.* v. *United States*, 287 U.S. 175 (1929), which related to the Federal tax on soft drinks. The statutory tax structure there involved did not contain the provisions referred to in the text, such as the direct refunds to certain consumer purchasers, and thus is distinguishable.

The legislative history of the gasoline tax supports this conclusion. The present gasoline tax is derived from the Revenue Act of 1932, Act of June 6, 1932, § 617, 47 Stat. 169, 266-67. Incident to the enactment of that Act, Senator Walsh, a member of the Committee on Finance, introduced a Floor amendment providing for a number of excise taxes, one of which was the gasoline tax. His comments on that amendment (S. Rep. No. 665, 72nd Cong., 1st Sess. 2 (1932), suggest that from the outset Congress, in providing for collection of the Federal gasoline tax from a limited number of producers, was not fixing its legal incidence on them, but was merely considering facility of collection.

When the refund provisions mentioned above were enacted by the Acts of April 2, 1956, § 1, 70 Stat. 87, and June 29, 1956, § 208(c), 70 Stat. 374, 394, the ultimate legal impact of the tax was also indicated by H. R. Rep. No. 1684, 84th Cong., 2d Sess. 1, 2 (1956). In that Report, Congress' purpose in enacting the refund provisions was described as an effort to diminish the "costs which the farmer must pay." "One of the costs which the farmer must meet", the report stated, "is the Federal . . . tax presently imposed on the gasoline he uses on his farm." See also S. Rep. No. 1609, 84th Cong., 2d Sess. (1956).

Moreover, when revising the statute in 1965, the House Ways and Means Committee reported that the Excise Tax Reduction Act of 1965, 79 Stat. 136, amending the Internal Revenue Code of 1954, was designed to "leave a tax system in which [certain] . . . excise taxes . . . are levied on the benefit principle." "Under this principle," the Committee reported (H. R. Rep. No. 433, 89th Cong., 1st Sess. 11 (1965)):

> "*those who benefit* from particular Government services help to pay the cost of the services by paying charges (in the form of excises) which to some extent

measure their *use* of the services. Included in this category are such taxes as those on *gasoline*, tires, and tubes, and other revenues allocated to the highway trust fund." (Emphasis added.)

In the same report, at pp. 14-15, the Committee continued:

> "Taxes such as those on gasoline . . . are *user taxes* . . . a tax on gasoline taxes users of the highways in rough proportion to their use of the service." (Emphasis added.)

Similarly, in his message to Congress of May 17, 1965, President Johnson stated that "reform of the excise tax structure will leave . . . excises on alcoholic beverages, tobacco, *gasoline*, tires, trucks, air transportation (and a few other *user-charges* and special excises). . . ." (Emphasis added.) H. R. Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).

The Court below relied on the statement in a 1961 Senate Committee Report that the Federal gasoline tax "is imposed on the producer, importer or wholesale distributor" (A. 5; S. Rep. No. 367, 87th Cong., 1st Sess. 22, 23 (1961)). But, as the opinion recognized (A. 6), this statement was made in connection with a provision which was deleted in conference and not enacted into law. It is thus entitled to little weight in determining the meaning of statutory language enacted many years before. Moreover, in this admittedly ambiguous situation, the term "imposed" could well have referred only to the fact that the manufacturer is required to *remit* the tax. Such a construction seems probable when it is recognized that the provision being supported by the Senate Committee dealt with refunds *to*

retailers for evaporation, not to manufacturers, who remitted the tax.

For the above reasons Martin believes the Supreme Court of Pennsylvania was correct in *Tax Review Board* v. *Esso Standard Division*, when it concluded (227 A.2d at 658-659):

> "However, it is our considered conclusion that the operative word in Section 4081 of the Internal Revenue Code, supra, is 'sold,' and the particular levy is a sales tax pure and simple. Further, the nature, *the size of the tax in relation to the wholesale price of the product*, and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.
>
> "*The revenue collected as a result of the tax does not go into the general treasury.* Instead, it is placed in a special fund and is used solely to defray the cost of the federal highway system. *It was designed to charge the motorists, who use the highways, with the cost thereof.* It has been recognized and characterized by both the President and Congress of the United States as a 'user tax.' Moreover, this conclusion is fortified by Section 6420(a) of the code itself, which provides for a refund *to the purchaser* if the gasoline is used on a farm for farm purposes." (Emphasis added.)

This Court denied a Petition for Certiorari in the *Esso* case. But unless this Court grants the instant Petition, the Pennsylvania interpretation will be followed in some states and the Illinois interpretation in others — and the legal incidence of a single Federal statute will be applied non-

uniformly under similar tax statutes in the several states. Martin, therefore, submits that the decision of the Illinois Supreme Court should be reviewed and reversed by this Court.

Respectfully submitted,

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